

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	

**COMMENTS**

**BELLSOUTH CORPORATION**

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**COMMENTS**

BellSouth Corporation on behalf of itself and its wholly owned subsidiaries (“BellSouth”) hereby submits its comments in response to the Notice of Proposed Rulemaking and Order (“Notice”) released on February 15, 2002.

**I. INTRODUCTION AND SUMMARY**

1. The purpose of this proceeding is to obtain comments on issues that were remanded to the Commission by the United States Court of Appeals for the Tenth Circuit<sup>1</sup> in its review of the Commission’s *Ninth Report and Order*.<sup>2</sup> The *Ninth Report and Order* established a federal high-cost universal service support mechanism for non-rural carriers. Upon review, the Tenth Circuit found that the Commission had not provided a satisfactory explanation for several aspects of its *Ninth Report and Order*. The Court found four problems with the Commission’s decision:

- the Commission did not adequately define the statutory terms “reasonably comparable” and “sufficient”;
- the Commission did not adequately explain setting the funding benchmark at 135 percent of the national average;

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<sup>1</sup> *Qwest Corp. v. FCC*, 258 F.3d 1191 (10<sup>th</sup> Cir. 2001).

<sup>2</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Ninth Report and Order and Eighteenth Order on Reconsideration*, 14 FCC Rcd 20432 (1999) (“*Ninth Report and Order*”).

- the Commission did not provide inducements for state universal service mechanisms; and
- the Commission did not explain how the high-cost funding mechanism will interact with other universal service programs.

In the Notice, the Commission solicits comments on the first three issues.

2. In remanding the *Ninth Report and Order*, the Court wants the Commission to establish the legal and factual foundation for the high-cost mechanism it promulgates. In addressing the absence of key definitions, the Court found it necessary for the Commission to define “these terms more precisely in a way that can be reasonably related to the statutory principles, and then to assess whether its funding mechanism will be sufficient for the principle of making rural and urban rates reasonably comparable.”<sup>3</sup> Likewise, the Court found wanting a satisfactory explanation by the Commission of the way in which the 135% benchmark will help achieve “the goal of reasonable comparability or sufficiency.”<sup>4</sup> Lastly, the Court was concerned with the absence of inducements for state commissions to act to support universal service, because the *Ninth Report and Order* acknowledged that the federal high-cost mechanism would only achieve reasonably comparable rates if the states implemented universal service policies.<sup>5</sup>

3. There are several notable aspects of the *Qwest Corp.* decision. The Court noted that the Communications Act compels the Commission to base its universal service policies on a list of enumerated principles. In fulfilling its obligation, however, the Commission may balance the principles against one another as long as the Commission works “to achieve each one unless

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<sup>3</sup> 258 F.3d at 1202.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1203.

there is a direct conflict between it and either another listed principle or some other obligation or limitation on the FCC's authority.”<sup>6</sup>

4. The Court went on to explain that each of the principles listed in the statute are phrased in the terms of the discretionary “should” not the mandatory “shall.”<sup>7</sup> Thus, the Court concluded, “the FCC must base its policies on the principles, but any particular principle can be trumped in the appropriate case.”<sup>8</sup>

5. In addressing the remand issues, the Commission is not without discretion. While the Commission must consider and address the specific concerns of the Court, it can do so by taking into account and balancing the other principles that are enumerated in the Communications Act, including the authority of the Commission to adopt additional principles that are necessary and appropriate to protect the public interest.<sup>9</sup>

6. Meeting the mandate of the Court does not necessitate abandoning the structure of the current high-cost universal service fund. To the contrary, it should remain the nucleus around which the Commission should make several enhancements that will improve the efficacy of the fund consistent with the Court's directives. Implicitly, if not explicitly, the current high-cost fund for non-rural companies was designed to foster each of the principles enumerated in the statute. The type of enhancements that BellSouth suggests below will provide the additional mechanisms to assure that the Commission's universal service policies and non-rural high-cost program fulfill the requirements of the Communications Act.

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<sup>6</sup> *Id.* at 1199.

<sup>7</sup> *Id.* at 1200.

<sup>8</sup> *Id.*

<sup>9</sup> 47 U.S.C. § 254(b)(7).

7. The anchor of the enhanced high-cost fund would be the current 135% benchmark. Each state where the average cost per line for non-rural carriers exceeds 135% of the national average per line cost would be eligible for high-cost support. In order to receive the support, state commissions, in addition to the current requirement of certifying that the funds are being used for universal service purposes, would have to take two additional steps. First, the state commission would have to permit carriers to reduce intrastate switched access rates to parity with interstate switched access rates in a revenue neutral fashion. Second, the state commissions would have to implement a plan that makes urban and rural rates comparable by setting rural rates at a level that is no greater than 110 percent of the urban rate but no less than the urban rate.<sup>10</sup>

8. To induce state commissions to act in a manner consistent with Commission universal service policies, the Commission should consider implementing a tiered supplemental support mechanism. The tiered supplemental mechanism would provide limited per line support to carriers serving states whose average cost per line is between 100% and 135% of the national average cost per line. In order for an eligible carrier to receive the supplemental support, the state commissions would have to meet the same conditions that state commissions have to meet to receive high-cost support based on the 135% benchmark, *i.e.*, intrastate access rates must be at a par with interstate access rates and rural rates must be adjusted to be within a comparable range to urban rates.

9. Recognizing that some states could theoretically choose not to receive the support provided by the federal fund by not meeting the conditions, and that there would be some states

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<sup>10</sup> States with average rural rates in excess of the national average urban rate could be given additional time to implement rate rebalancing within their state.

that would not receive support based on the benchmark, the Commission should add another element to its universal service mechanism that would provide an additional incentive for the state commissions to adopt universal service policies that further the overall objectives of Section 254 of the Communications Act. The additional element would condition the receipt of federal matching funds for Lifeline service upon the state commissions implementing the realignment of intrastate access rates and urban and rural rates.

10. The enhancements to the high-cost fund for non-rural carriers are for the purposes of addressing the Court's concerns and ensuring that the universal service mechanisms achieve the Commission's universal service goals. In addition to the specifically enumerated principles, a standing principle of the Commission has been to ensure that the size of the federal universal service fund is not excessive. The enhancements, without further adjustments, could increase the size of the fund significantly. However, such a result is not an unavoidable outcome.

11. In addition to the incentives proposed by BellSouth, BellSouth believes that the Commission should make several administrative changes to the fund to make it more efficient and to reduce its cost. The first change is that all business lines should be ineligible for receiving support from the federal high-cost fund. Next, an eligible telecommunications carrier ("ETC") should be limited to support for only one residential line per customer location. Lastly, in order for an ETC to receive support for a residential line, the supported service must be working at the customer's residence in the high-cost area.

12. All of the adjustments would serve to keep the size of the federal universal service high-cost fund within acceptable limits. None of the adjustments, however, would affect the sufficiency of the fund. Instead, they would better relate support per line to the delivery of supported universal service.

13. As a whole, BellSouth's framework presents an improvement on the current high-cost fund not a wholesale abandonment of the fund. Because BellSouth's proposal builds upon the experience that the industry has had under the current mechanism, the suggested adjustments would be relatively simpler and quicker to implement than discarding the existing mechanism and creating a new mechanism from scratch. The *Qwest* Decision does not require a radical departure from the path the Commission has been following. As BellSouth shows in these comments, fine-tuning the existing mechanisms to address directly the Court's criticisms is, by far, a preferable approach in that it will cause the least disruption and thus will serve the public interest.

## **II. A MODIFIED NON-RURAL HIGH-COST FUND**

14. In addressing the criticisms of the Court, the changes to the high-cost mechanism that the Commission adopts in this proceeding should be viewed in their entirety to assure that the Commission has corrected the deficiencies identified by the Court. The criticisms regarding sufficiency, the benchmark and state inducements are interrelated. Thus, for example, adding state inducements would not only address a specific criticism of the Court, but the addition of such inducements would also assist in explaining and justifying the cost benchmark and the sufficiency of the fund.

15. In assessing modifications to the non-rural high-cost fund, the Commission cannot approach the task linearly. The interrelationships of all of the elements of the mechanism have to be considered and a determination made that the mechanism, as a whole, achieves the desired result.



16. To begin the process, the Commission must consider the statutory principle that the Court believed had not been adequately addressed. The Court's concerns regarding reasonably comparable urban and rural rates and the sufficiency of the fund relate to two principles—access in rural and high cost areas<sup>11</sup> and specific and predictable support mechanisms.<sup>12</sup> Accordingly, in this proceeding the Commission must address how the non-rural high cost fund (which was the subject of the Court's review) advances the goals enumerated in these principles.

17. In order to accomplish this objective, the Commission must first look at the principles themselves. The high-cost principle provides:

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charge for similar services in urban areas.<sup>13</sup>

This principle is complemented by the predictable support principle:

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.<sup>14</sup>

18. The high-cost principle lists many goals, but the Court's concern was focused on rural and urban rate comparability. The particular rate comparability that is the goal of the principle pertains to services in rural, insular and high-cost areas. The mechanism under review by the Court pertains to non-rural companies. While the Commission has an obligation to provide a permanent funding mechanism for rural companies, the Court did not require the Commission to

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<sup>11</sup> See 47 U.S.C. § 254(b)(3).

<sup>12</sup> See 47 U.S.C. § 254(b)(5).

<sup>13</sup> 47 U.S.C. § 254(b)(3).

<sup>14</sup> 47 U.S.C. § 254(b)(5).

resolve finally all issues at once.<sup>15</sup> Modifying the non-rural high-cost mechanism is a necessary first step and could well provide a framework for a rural high-cost mechanism. Indeed, the inducements for state commissions to act in a manner to achieve the Commission's objectives would be features easily transportable to a rural company support mechanism.

19. An initial determination to address the high cost principle is for the Commission to give meaning to the term "high cost." The 135% benchmark achieves this goal and should be retained by the Commission as an element of its universal service mechanism. The benchmark represents a demarcation, applicable to non-rural companies, of study areas (*i.e.*, states) that should be classified as high cost areas. The benchmark represents a reasonable division of responsibility between federal and state funding of universal service. It is the best estimate of a point in which federal support is needed to meet the universal service goals because, at this point, the cost of providing supported services substantially exceeds the national average. It balances jurisdictional responsibility that effectively enables reasonably comparable local rates to be achieved.

20. The Court's objection to the benchmark was predicated on its inability to discern how the benchmark contributed to the achievement of universal service principles.<sup>16</sup> In isolation, the nexus between the benchmark and the universal service principles may not be obvious. The benchmark, however, cannot be considered in isolation of other elements. In other words, by adding the appropriate state inducements to the federal mechanism, the benchmark will provide sufficient support to achieve the Commission's universal service policies.

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<sup>15</sup> 285 F.3d at 1205.

<sup>16</sup> *Id.* at 1203.

21. The benchmark establishes the study areas that are eligible for federal support payments. In order to foster the achievement of the universal service principle of reasonably comparable rates in urban and rural areas, BellSouth suggests that the Commission adopt modifications to the current high-cost mechanism that add additional conditions in order for an eligible telecommunications carrier to receive the support to which it would be entitled. The high-cost payments are an incentive. Conditioning receipt of federal support upon the state commission making regulatory changes in intrastate service rates is essential to the achievement of universal service policies. As the Court recognized, the Commission cannot implement universal service by itself because it lacks jurisdiction over intrastate service.<sup>17</sup> The Commission “remains obligated to create some inducement – a ‘carrot’ or a ‘stick,’ for example, or simply a binding cooperative agreement with the states – for the states to assist in implementing the goals of universal service.”<sup>18</sup>

22. BellSouth suggests that, in addition to the existing requirement that state commissions certify that federal support is being used for universal service purposes, state commissions should certify that they have taken two additional steps. First, state commissions should permit carriers to reduce intrastate switched access rates so that they are at the same level as interstate switched access rates in a revenue neutral manner. Next, state commissions should be required to implement a plan that makes urban and rural rates of the eligible telecommunications carrier comparable.<sup>19</sup> These conditions foster universal service by removing implicit subsidies and establishing rural and urban rate comparability.

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1204.

<sup>19</sup> Urban and rural rate comparability would be established if the rural rate is set equal to but not to exceed 110 percent of the urban rate. As noted earlier, states with state-wide average rural

Footnote Continued

23. In order to meet the second condition, parameters have to be established to circumscribe the terms “rural” and “urban.” While the rates for BellSouth local exchange services are established by rate groups which reflect customer density and, thus, provide a ready mechanism by which to identify rural and urban rates, BellSouth is without knowledge regarding the rates of other local exchange carriers. The Joint Board is a resource that should participate in defining the parameters of rural and urban rates within a state.

24. While the modifications to the existing federal high-cost fund address the Court’s concerns regarding justification of the benchmark and the contribution of the support mechanism to achievement of the statutory principles for universal service, the high-cost fund alone does not address the sufficiency of federal and state mechanisms to “preserve and advance universal service.”<sup>20</sup> For study areas whose cost per line falls below the benchmark, state commissions are responsible for implementing universal service mechanisms that will contribute to the preservation of universal service. The Court remarked that where the Commission is relying on state action to fulfill universal service objectives, the Commission could not just assume that the state commissions will act on their own.<sup>21</sup> Instead, it is the Commission’s obligation to provide the necessary inducements to encourage state action.<sup>22</sup>

25. BellSouth suggests two additions to the federal mechanism in order for the Commission to fulfill its obligation—one a “carrot,” the other a “stick.” As a carrot, the Commission should implement a banded, supplemental support mechanism. The supplemental

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rates above the nationwide urban rate could be given additional time to complete any needed rate rebalancing.

<sup>20</sup> 47 U.S.C. § 254(b)(5).

<sup>21</sup> 285 F.3d at 1204.

<sup>22</sup> *Id.*

mechanism would be an additive to the existing high-cost mechanism. All states that have average per line costs that are at least 100 percent of the national average would be eligible for the supplemental support. The supplemental support provides additional, limited per line support to carriers for that portion of the cost per line that is between 100 and 135 percent of the national average. In order to receive support from the supplemental mechanism, state commissions would have to certify to the same conditions that apply to the high-cost fund.<sup>23</sup>

26. In implementing the supplemental mechanism the Commission should consider using a banded approach (similar to graduated income tax brackets), with increased support per line being associated with higher cost bands. For example, the supplemental support mechanism could have two bands. Band one would provide support where the average cost per line is between 100 and 115 percent per line. Band two would provide additional support if the average cost per line is above 115 percent to a maximum of 135 percent.<sup>24</sup> The operation of this supplemental mechanism can best be understood through an example.

27. Let's assume that the nationwide average non-rural cost per line is \$23.00 per line. The cost per line at 115 percent of the national average is \$26.45. The cost per line at 135 percent of the national average is \$31.05. Assume that the average non-rural cost per line for STATE X is 126 percent of the national average or \$28.98. Assume that the support per line in the supplemental mechanism is 10 percent for costs above 100 percent of the national average, up to 115 percent of the national average, and 30 percent for costs above 115 percent and up to 135 percent of the national average. STATE X's supplemental support would be calculated as follows:

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<sup>23</sup> See paragraph 22 *supra*.

- For the portion of its costs above the national average up to 115 percent, STATE X would receive  $[\$26.45 - \$23.00] * .10 = \$ .35$  per line;
- For the portion of its per line costs above 115%, up to 135%, STATE X would receive  $[\$28.98 - \$26.45] * .30 = \$ .76$  per line;
- STATE X's total supplemental support per line equals  $\$.35 + \$.76 = \$1.11$ .<sup>25</sup>

28. While the supplemental support mechanism represents a carrot to induce state action that supports universal service objectives, the Commission can go one step further with a stick to get state commissions to act to remove implicit subsidy and establish comparable urban and rural rates. The Commission could condition federal matching Lifeline funds upon a state commission equalizing intrastate and interstate access rates (on a revenue neutral basis) and establishing comparability between urban and rural rates.<sup>26</sup>

29. If the Commission adopts BellSouth's suggested modifications, the resulting federal mechanism fully addresses the concerns expressed by the Court. By establishing specific conditions for the receipt of federal support that are aimed at achieving the goals and statutory principles of universal service, the Commission will have acted in precisely the manner envisioned by the Court, *i.e.*, creating a mechanism that induces the states to implement the goals of universal service.

30. Making the modifications suggested by BellSouth would, without other changes, increase the size of the federal support mechanism. As an additional universal service principle, maintaining a reasonably sized federal fund is an important objective. There is nothing in the

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<sup>24</sup> If the average cost per line is above 135 percent, the state would also receive high-cost support as it does today.

<sup>25</sup> Instead of a cost per line of \$28.98, assume that STATE X had an average cost per line of \$32.20 or 140 percent of the national average. STATE X would receive Band One Supplemental support of  $[\$26.45 - \$23.00] * .10 = \$ .35$  per line; Band Two Supplemental Support of  $[\$31.05 - \$26.45] * .30 = \$1.38$ ; and non-rural high-cost support (the existing mechanism) of  $[\$32.20 - \$31.05] * .76 = \$ .87$ . Total per line support in STATE X would be \$2.60.

Court's opinion that suggests the Commission cannot consider size and the appropriate division of responsibility between the state and federal commissions. Indeed, the Court rejected Qwest's argument that the FCC alone must support the full costs of universal service.<sup>27</sup>

31. BellSouth believes that there are certain administrative changes that the Commission could make to the high-cost fund that would make it more efficient and reduce its cost without affecting the fund's ability to achieve the universal service objectives that it was designed to achieve. The first change would be to make business lines ineligible for support from the federal high-cost or supplemental mechanisms. Next, an ETC should be limited to support for only one residential line per location. Lastly, in order for an ETC to receive support for a residential line, the supported service must be working at the customer's residence in the high-cost area.

32. All of these adjustments would serve to keep the size of the federal universal service high-cost fund within reasonable limits. None of the adjustments, however, would affect the sufficiency of the fund. Instead, they would better relate the support per line to the delivery of supported services—the penultimate purpose of the universal service provisions of the Communications Act.

33. By building upon the existing federal high-cost fund mechanism, BellSouth's suggested modifications should be capable of implementation by January 1, 2004. Nevertheless, the Commission must be mindful that states have been and will continue to receive support based on the existing mechanism. Without question the support under the modified mechanism will change the amount of support a state receives.

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<sup>26</sup> See Note 18 *supra*.

<sup>27</sup> 258 F.3d at 1203.

34. For current state recipients of high-cost support, the Commission should adopt a transition mechanism similar to the hold-harmless mechanism the Commission employed when it first implemented the current high-cost fund. Under the transition plan, existing recipients of high-cost support would receive the higher of the support calculated under the existing plan (without any fund or administrative changes) and the modified fund mechanisms. The transition period would conclude January 1, 2005. The transition period would afford states time to make any necessary adjustments associated with changing support levels.

35. In these comments, BellSouth has presented an approach to universal service that addresses the Court's concerns and ensures that the universal service mechanisms collectively operate to achieve the principles enumerated in the Communications Act and the Commission's policies. Because BellSouth's approach builds upon the experience that the industry has had under the current mechanism, the suggested adjustments and modifications would be relatively simpler and quicker to implement than discarding the existing mechanism and creating a new mechanism from scratch. Fine-tuning the existing mechanisms to address specifically the Court's criticisms is a preferable approach because it will be the least disruptive and thus will serve the public interest.

Respectfully submitted,

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Date: April 10, 2002

**CERTIFICATE OF SERVICE**

I do hereby certify that I have this 10<sup>th</sup> day of April 2002 served the following parties to this action with a copy of the forgoing **COMMENTS** by electronic filing to the parties listed below.

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/s/ Juanita H. Lee  
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**+ VIA ELECTRONIC FILING**